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NO. 80-1264

IN THE

Supreme Court of the United States

October Term, 1980

GENERAL TELEPHONE COMPANY OF THE SOUTHWEST,
Petitioner,

v.

MARIANO S. FALCON,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

RESPONDENT WOULD STATE THE ISSUES AS FOLLOWS:

1. WHETHER "ACROSS THE BOARD" ATTACKS IN TITLE VII CASES ARE STILL ALLOWED AFTER THIS COURT'S DECISION IN *EAST TEXAS MOTOR FREIGHT SYSTEMS, INC. V. RODRIGUEZ*, 431 U.S. 395 (1977).

2. WHETHER RESPONDENT-FALCON PROVED THAT GENERAL TELEPHONE DISCRIMINATED AGAINST HIM IN HIS INDIVIDUAL PROMOTION CLAIM.

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent, MARIANO S. FALCON, individually and as class representative, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Fifth Circuit's opinion in this case. That opinion is reported at 626 F.2d 369 (5th Cir. 1980).

STATEMENT OF THE CASE

Respondent is dissatisfied with Petitioner's "statement" as it omits material findings and conclusions made by the trial court.

At the conclusion of the phase I (liability) portion of the case, the trial judge on March 22, 1977, specifi-

cally found that Mariano S. Falcon "fairly and adequately"represents Mexican-Americans now employed and those who have applied for employment at General Telephone's Irving facility (see p. 37a, Appendix, General Telephone's Petition).

Previously, General Telephone was informed by the trial court that it could raise the " . . . issue of this provisionally-certified class during or after the presentation of the class claims and evidence at trial." (See p. 48a, Appendix, General Telephone's Petition).

With respect to Falcon's individual claim (based on discrimination in promotion) the trial court found, among other facts:

1. The supervisory personnel responsible for evaluating promotions were Caucasians (p. 33a, Appendix, General Telephone's Petition, finding #8).

2. "The criteria used to rate and to promote are subjective and are not based on objective criteria." (p. 33a, Appendix, General Telephone's Petition, finding #8).

3. Falcon had more seniority than those promoted over him. (p. 34a, Appendix, General Telephone's Petition, finding #10).

REASONS FOR DENYING THE WRIT

I. *EAST TEXAS MOTOR FREIGHT SYSTEMS, INC. V. RODRIGUEZ* DOES NOT PROHIBIT TITLE VII "ACROSS THE BOARD" ATTACKS ON DISCRIMINATORY EMPLOYMENT PRACTICES.

Unless this Court wishes to abolish or modify "across the board" attacks in Title VII cases there is no need

to grant the writ. There simply is no language in *East Texas Motor Freight v. Rodriguez*, 431 U.S. 395 (1977), that says broad attacks in racial discrimination cases are outlawed, or even outmoded. Regardless of Petitioner's unclear position,[1] there is no conflict between the Fifth Circuit opinion in *Falcon* and *East Texas Motor Freight Systems, Inc. v. Rodriguez, supra.* This Court's opinion in *Rodriguez* did not prohibit "across the board" class action in Title VII cases. Rather, this Court held in *Rodriguez* that "a class representative must be part of the class and 'possess the same interest and suffer the same injuries' as the class members". *Id.* at 403. This conclusion was reached since the class representatives were found by the trial court and the court of appeals not to have suffered an injury as a result of alleged discriminatory practices.

Unlike *Rodriguez, Falcon* has suffered an injury as a result of unlawful employment discrimination. The Fifth Circuit correctly found that there was a sufficient nexus between the Plaintiff's claims and those of the class to satisfy the requirement of Rule 23 and, that such a finding, to allow a Plaintiff to represent a class suffering from a common discriminatory complaint, was consistent with the holding in *Rodriguez* and the policy of Title VII. 626 F.2d at 375.

Petitioner's argument that the Fifth Circuit's decision in *Falcon* conflicts with this Court's holding in *Rodriguez* is tantamount to arguing that *Rodriguez*

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[1] Petitioner argues that *Rodriguez* "* * * precludes the continued use of the across the board approach to class actions." (Petition, p. 7) And, near the end of its Petition says: "Finally, petitioner is not asking that this court end broad-based class actions in employment discrimination cases." (Petition, p. 17)

mandates an automatic rule that a victim of a policy of discrimination by an employer cannot represent other victims of the same policy unless their positions and specific injuries are identical. Such a result would allow Rule 23 requirements to defeat the policy behind Title VII, a result that is not present in the holding of *Rodriguez.*

The Fifth Circuit, in its decisions since *Rodriguez,* has addressed the issue of "across the board" attacks on discrimination in a manner consistent with Title VII policy and the holding in *Rodriguez. Satterwhite v. City of Greenville,* 578 F.2d 987 (5th Cir. 1978), *vacated and remanded on other grounds,* 445 U.S. 940 (1980); and, *Payne v. Travenol Laboratories, Inc.,* 565 F.2d 895 (5th Cir.) *cert. denied* 439 U.S. 835 (1978). In *Satterwhite, supra,* the Fifth Circuit made the same distinction that has been made in *Falcon* in stating that *Rodriguez* involved named plaintiffs who lacked a nexus with the class as a result of the lack of merit of their individual claims and the *Rodriguez* opinion was not contrary to the policy favoring "across the board" Title VII class actions. *Satterwhite, supra,* at 993 n.8. In *Payne v. Travenol, Inc., Supra,* at 900, the Fifth Circuit specifically addressed the issue raised by the Petitioner and held that,

> "Plaintiffs' action is an 'across the board' attack on unequal employment practices alleged to have been committed by Travenol pursuant to a policy of racial discrimination. As parties who have allegedly been aggrieved by some of these discriminatory practices, plaintiffs have demonstrated a sufficient nexus to enable them to represent other class members suffering from different practices motivated by the same policies."

The policy behind these decisions are mandated by the purpose of Title VII. Rule 23 must not be read in a vacuum, but rather, against the nature and purpose of the substantive law of plaintiff's claim. *Quigley v. Braniff Airways, Inc.*, 85 F.R.D. 74 (N.D. Tex. 1979). "Congress intended Title VII to be a broad, remedial measure aimed at eliminating the widespread discriminatory employment conditions that have a destructive impact not only on those 'forced into a condition of marginal existence' but also on the nation as a whole deprived of the talents of the victims of discrimination." *Quigley, supra* at 78, citing [1964] U.S. Code Cong. & Admin. News, pp. 2355, 2514; See *Id.* at 2525, 2516; H.R. Rep. No. 914; *Id.* at 2393; S. Rep. No. 872; *Id.* at 2377. See also, *Cooper v. University of Texas at Dallas*, 482 F.Supp. 187, 192 (N.D. Tex. 1979), and *Vuyanich v. Republic National Bank of Dallas*, 82 F.R.D. 420, 432-33 (N.D. Tex. 1979).

As a result of the purpose behind Title VII, Rule 23 standards must be given sufficient breadth to carry out congressional goals. The Fifth Circuit's opinion in *Falcon* allows this breadth in view of the particular facts of the case. This is not in conflict with *Rodriguez* and to hold otherwise would forbid "across the board" attacks against discriminatory employment practices with the practical results of defeating class actions under Title VII in most circumstances, regardless of the facts.

II. THE FIFTH CIRCUIT'S HOLDING IN *FALCON* DOES NOT CONFLICT WITH THE DECISION OF THIS COURT IN *GENERAL TELEPHONE COMPANY OF THE NORTHWEST* OR WITH

THE THIRD CIRCUIT'S DECISION IN *SCOTT V. UNIVERSITY OF DELAWARE.*

After a careful review of the trial court evidence the Fifth Circuit concluded (as did the trial court) that Falcon adequately represented the class with respect to both hiring and promotional discrimination claims. A sufficient nexus was demonstrated between his claim of promotional discrimination and the other class members' claims of hiring discrimination. Falcon and the class members suffered from the same injury, namely, employment discrimination because of national origin.

The Fifth Circuit's holding in *Falcon* does not conflict with decisions of this Court or those of other Courts of Appeals. In *General Telephone Company of the Northwest v. Equal Employment Opportunity Commission*, 100 S.Ct. 1698 (1980) this Court was not concerned with "across the board" attacks or their use in employment discrimination cases. Rather, in very explicit language, this Court ruled that the EEOC may maintain a Title VII enforcement action without first obtaining class certification pursuant to Rule 23. 100 S.Ct. at 1708.

In passing on this issue, in dicta, this Court did observe several problem areas in dealing with Rule 23. It was noted that conflicts *might* arise between employees and applicants if they are competing for fringe benefits or seniority, 100 S.Ct. at 1707. Under those circumstances the same plaintiff *might* not be able to represent different classes. The mere observation about problems that conceivably could arise in Title VII class litigation fails to rise to the status of a "conflict" with the Fifth Circuit's decision in this case. There

simply is no conflict between *Falcon* and *General Telephone Company of the Northwest.*

Likewise, *Scott v. University of Delaware*, 601 F.2d 76 (3rd Cir.) *cert. denied*, 444 U.S. 93 (1979) raises no conflict with *Falcon* since a concurring opinion clearly said, 601 F.2d at 92, that the ruling in that case was not intended to represent a constriction upon the availability of the class action device in suits charging "across the board" discriminatory employment practices.[2] In *Scott* there was a clear conflict on the part of the class representative which simply did not arise in the instant case. The Fifth Circuit observed that Falcon showed more than an alliance based simply on the same type of discriminatory claim. "He also showed a similarity of interests based on job location, job function and other considerations."

Petitioner's analysis of the issues simply fails to explain how *General Telephone Company of the North-West* and *Scott v. University of Delaware* conflict with Falcon's theory of an "across the board" attack. Respondent submits the writ should be denied because there is no substantial conflict that would warrant the court's attention.

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[2] General Telephone (p. 12, Petition) conveniently overlooked that portion of the *Scott* decision. In fact, one of the commentators on which Petitioner relied heavily (pp. 6, 14, 17, Petition) cites *Scott* as authority for a liberal certification trend even after Rodriguez! Rutherglen, Title VII Class Actions, 47 U.Chi.L.Rev. 688, 723, n. 210 (1980).

III. FALCON PROVED THAT GENERAL TELEPHONE DISCRIMINATED AGAINST HIM IN HIS INDIVIDUAL PROMOTION CLAIM EVEN UNDER THE RECENTLY ANNOUNCED *BURDINE* STANDARDS.

This Court's ruling in *Texas Department of Community Affairs v. Burdine*, ____ U.S. ____ 49 U.S.L.W. 4214 (U.S. March 3, 1981) does not require reversal of the instant case. Plaintiff in *Burdine* failed to carry her burden of proof in the trial court and did not establish discrimination in either the promotion or termination decisions involved in her case. Falcon, on the other hand, did obtain findings of fact and conclusions of law establishing discrimination in promotional conduct by General Telephone. Petitioner, therefore, simply failed to persuade the trial judge that its proferred explanations for not promoting Falcon were not pretextual.

This Court stated that Burdine could have carried the burden of persuasion in her case in one of two ways, 49 U.S.L.W. at 4216:

> "She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. See *McDonnell Douglas*, supra, at 804-805."

There is ample evidence in this record, all noted in the Fifth Circuit's opinion, that the trial judge simply felt that General Telephone's explanations were indeed pretextual. Under these circumstances, Petitioner has failed in its efforts to show that the trial court's findings are clearly erroneous as required by Fed.R.Civ.P. 52(a).

CONCLUSION

Petitioner has presented no basis for asserting a conflict between this Court's decisions and the Fifth Circuit's holding in the instant case. The petition should be denied.

Respectfully submitted,

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